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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE and THE CITY OF LOS ANGELES,
Petitioners,
VS.
VIVIANA McCALDEN, as Administrator of the Estate of David McCalden,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

David McCalden's[1] claims arose as a result of a conspiracy which led to concerted action, in the form of escalating pressure tactics, including threats and intimidation, taken by petitioners Simon Wiesenthal Center for Holocaust Studies ("SWC"), Rabbi Marvin Hier ("Hier"), The American Jewish Committee ("AJC") and the City of Los Angeles ("City") in order to coerce the California Library Association ("CLA") to cancel McCalden's contracts for presentation of an exhibit and program at the CLA's 86th Annual Conference. McCalden was a Holocaust revisionist; however, the purpose of his exhibit and program was not to discuss the Holocaust, but to display censored publications and to discuss efforts to supress the speech of Holocaust revisionists. Acts taken in furtherance of the conspiracy include: direct communication of threats of violence, disruption and property damage; specific actions designed to increase the likelihood that these things would happen; intimidation by refusal to provide police protection after police confirmation that threats of violence were serious; and the imposition of political and economic sanctions. The conspirators' actions were motivated by a class-based, invidiously discriminatory animus against McCalden because he was a Holocaust revisionist. The conspirators acted solely for the purpose of preventing McCalden from associating with or expressing his views about free speech and the Holocaust to CLA members.

Petitioners seek review of an interlocutory decision of the Court of Appeals. (A15)[2] Ruling on F.R.Civ.P. 12(b)(6) motions, the Court of Appeals held that McCalden had stated claims for breach of contract, for interference with contract and for violation of California's Unruh Act (which imposes liability for intimidation by threats of violence) and that, having erroneously dismissed McCalden's claim for deprivation of civil rights under 42

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[1]David McCalden, now deceased, was originally the plaintiff in this action. Viviana McCalden, as administrator of David McCalden's estate, was substituted as plaintiff-appellant on July 15, 1991.

[2] "A" shall refer to Appendices attached to the petition for certiorari, followed by the page number.

U.S.C. Section 1983, the District Court should reconsider that claim to determine whether a cause of action is stated. (A15)[3]

STATEMENT OF FACTS

In 1984, McCalden entered into two written contracts with the CLA, one to present an exhibit entitled "Publishers of revisionist, libertarian and athiest research. Specializing in the defense of civil liberties for unpopular causes," and the other to present a program entitled "Free Speech and the Holocaust — An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject." (A63) The exhibit and program were scheduled as part of the CLA's 86th Annual Conference which was to be held at Los Angeles in December, 1984. (A63)

Prior to the Annual Conference, McCalden's participation came to the attention of SWC, Hier and AJC. (A64-67) These parties, with City joining at some point after initial actions were taken, entered into a conspiracy to make a deliberate and concerted effort to organize and effect a campaign of escalating pressure tactics, solely for the purpose of forcing the CLA to cancel its contracts with McCalden and preventing McCalden from associating with or expressing his views to CLA members. (A64-73) SWC, Hier, AJC and City engaged in overt acts of intimidation and threats,[4] including: (1) Through AJC, they met privately with the CLA to inform them directly that if McCalden's contracts were not cancelled the Annual Conference would be disrupted, there would be property damage and the CLA would be "wiped out" (A65); (2) through SWC and Hier, they made extortionate threats to the CLA by threatening and organizing a demonstration which they knew and intended would

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[3] The Court of Appeals also upheld the dismissal with prejudice of McCalden's claims under 42 U.S.C. Sections 1985(3) and 1986. That final ruling is the subject of McCalden's petition for writ of certiorari, number 91-1699.

[4] These parties are jointly and severally liable for the acts of their co-conspirators. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940).

create a reasonable probability of property damage and of violence against McCalden and CLA members, and then offering to remove the threat if the CLA cancelled its contracts with McCalden and publicly dissociated itself from him (A67); (3) through SWC and Hier and AJC, they increased the likelihood of violence and intimidation by informing militant, violence-prone Jewish organizations about McCalden's exhibit and program in order to encourage these groups to disrupt McCalden's program and the Conference (A67-68); (4) through the Los Angeles Police Department, they intimidated the CLA and McCalden by informing the CLA that there would be violent demonstrations, and then by informing the CLA that City would not provide adequate police protection or security for the Annual Conference (A70-71); (5) through SWC and Hier, they increased the likelihood of violence and intimidation by inducing the Westin Bonaventure Hotel to rent SWC a conference room next to the room where McCalden's program was to be presented, so they could disrupt the program (A66); and (6) through the Los Angeles Police Department, they intimidated the CLA by informing its executive director that the police had received death threats against him if he allowed McCalden to speak and that these threats were "real," and then by informing the CLA director that City would not provide adequate police protection or security for the Conference (A70-71).

In furtherance of the conspiracy, SWC, Hier, AJC and City also engaged in overt acts of political and economic sanctions, including: (1) getting California Assembly Speaker Willie Brown, California Senate President David Roberti and other public officials to aid and abet the conspiracy by pressuring the CLA to cancel McCalden's program and exhibit (A68); (2) having Los Angeles Mayor Tom Bradley instruct the Los Angeles Library Commission to boycott the CLA's Annual Conference (A68); and (3) having the Los Angeles City Council pass a resolution publicly condemning the CLA and imposing severe economic sanctions by severing all ties with the CLA (A65-66).

The City Council's resolution is tantamount to a bill of attainder because it targeted Holocaust revisionists for their unpopular views. The City Council stated that it was taking this action

because the CLA had not given in to protests from SWC, AJC and others, thus indicating a clear intent to join with private parties in their conspiracy to prevent McCalden from expressing his views. Such intent is further indicated by the fact that the Council conducted its debate without notice to McCalden and without making any effort to verify the sweeping allegations on which the resolution was based. (A69-70, ER49-53 — transcript of Council meeting)[5] The full text of the Council resolution (ER48), which was incorporated in McCalden's complaint as Exhibit D, is as follows:

> WHEREAS, the CALIFORNIA LIBRARY ASSOCIATION is meeting in Los Angeles on December 1 to 5, 1984; and
>
> WHEREAS, the California Library Association has invited five speakers who are outspoken in their denial of the World War II Nazi Holocaust; and
>
> WHEREAS, the California Library Association has failed to respond to protests from the American Jewish Committee, the Simon Wiesenthal Center, Survivors of the Holocaust, a wide spectrum of Los Angeles' communal leadership and citizens of all faiths:
>
> THEREFORE, BE IT RESOLVED that the Los Angeles City Council goes on record that while we must protect the right of all Americans to express their views, there is no obligation to provide the forces of hatred such respected platforms. We therefore call on the California Library Association to recognize their grave error of judgment and urge them to remove these individuals from their program.
>
> FURTHER, that whatever City participation in the California Library Association, formal or informal, be immediately severed in protest of the California Library Association action.

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[5]"ER" shall refer to Excerpts of Record filed in the Ninth Circuit on August 15, 1988, followed by the page number.

After all of the foregoing actions were taken, the CLA gave up and cancelled its contracts with McCalden, and McCalden was not permitted to attend or to express his views concerning free speech and the Holocaust at the Annual Conference. (A65-74)[6]

REASONS FOR DENYING THE WRIT

The first three questions presented, *i.e.*, whether petitioner's conduct involving threats of violence and impositon of political and economic sanctions is privileged under the First Amendment, concern primarily the interpretation of facts alleged in respondent's complaint, and therefore are not proper subjects for review by this Court. *United States v. Johnston,* 268 U.S. 220, 227 (1925); *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981). The fourth question presented, *i.e.*, the pleading standard to be applied if all of defendants' conduct is *prima facie* protected by the First Amendment, assumes an interpretation of facts entirely in favor of petitioners, something

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[6] On remand, McCalden would seek leave to amend her complaint to allege the following additional facts: (1) the CLA became interested in permitting McCalden to exhibit his publications because public libraries in the Los Angeles area refused to accept such exhibits during their observance of "banned books week;" (2) McCalden's program on "Free Speech and the Holocaust" was to be moderated by a representative of the Los Angeles office of the ACLU; (3) the CLA initially cancelled McCalden's contracts after being threatened by AJC and told it would be "wiped out;" (4) after McCalden threatened to sue, the CLA reinstated his contracts, thus triggering the escalating campaign of pressure tactics which led to City's joining the conspiracy; (5) the Los Angeles Police Department's warning of death threats against the director of the CLA coupled with refusal to provide police protection occurred on the same day that the Los Angeles City Council notified the CLA that it had denounced the CLA and imposed severe economic sanctions against it; and (6) after McCalden's contracts were cancelled, SWC referred to the conspiracy in a fund raising letter to its members: "It was only because of swift action by the Simon Wiesenthal Center and the American Jewish Committee that the McCalden presentation was thwarted."

the Court of Appeals was not willing to do on a Rule 12(b)(6) motion. (A 9-10)

The Court of Appeals has remanded this case. Procedurally, it is still at the initial pleading stage. Since the Court of Appeals' decision is within the accepted and usual course of judicial proceedings, the petition for certiorari should be denied. *See*, Supreme Court Rule 10(a).

I

PETITIONERS' CONDUCT IS NOT PRIMA FACIE PROTECTED BY THE FIRST AMENDMENT

The petition for certiorari is based on an incomplete and incorrect statement of the facts alleged in McCalden's complaint. Contrary to what is stated in the petition (P2),[7] the CLA did not contract with McCalden to hear him discuss the Holocaust as a hoax. His exhibit and program concerned free speech and the Holocaust.

Petitioners did not merely advocate violence or a violent demonstration. (P10) AJC directly threatened disruption and property damage and stated that the CLA would be "wiped out" unless McCalden's contracts were cancelled. SWC and Hier directly threatened a demonstration which they intended to be violent unless the contracts were cancelled and the CLA publicly dissociated itself from McCalden. These threats were extortionate.

Petitioners did not merely engage in the use of vehement, caustic or rough language. (P14) SWC and Hier rented a conference room so they would have access to the hotel and an opportunity to disrupt McCalden's program. SWC, Hier and AJC increased the likelihood of disruption by encouraging militant, violence-prone Jewish organizations to participate in the demonstration. City, apparently believing violence was likely, nevertheless withdrew or refused to provide police protection. This

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[7] "P" shall refer to the petition for writ of certiorari, followed by the page number.

conduct amounts to intimidation. The intended victims could reasonably fear that the threats were being carried out.[8]

Petitioners cite many well-known First Amendment cases on advocacy. But the facts, viewed in a light favorable to respondent, as they must be on an F.R.Civ.P. 12(b)(6) motion, clearly indicate intimidation by threats of violence. SWC, Hier and AJC did not contact the CLA merely to advocate abstract concepts of violence and disruption; they used every means at their disposal, including direct threats and conduct calculated to cause disruption, to coerce the CLA to cancel McCalden's contracts. There is no First Amendment right to intimidate by threats of violence or to magnify threats of violence by refusing to provide police protection. Nor is there a First Amendment right intentionally to organize a violent demonstration or to plan disruption of a conference to prevent someone from speaking. On the facts alleged, the Ninth Circuit correctly distingushed *Brandenberg v. Ohio,* 395 U.S. 444 (1969) and *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982). Indeed, it was noted in the decision (A10-11) that this Court stated unequivocally in *Claiborne* that individuals who "engaged in violence or threats of violence . . . may be held responsible for the injuries that they caused." *Id.,* at 926.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING HEIGHTENED PLEADING STANDARDS

Petitioners themselves cite the leading Ninth Circuit case on heightened pleading standards. (P20) *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076

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[8] Petitioners mislead this Court by including in their statement of the case (P4) respondent's allegation that the "real and only substantial" reason for the CLA's decision to cancel its contracts was concern about loss of support as a result of the Los Angeles City Council resolution. That allegation was pleaded in the alternative and only against the CLA on a breach of contract claim. The Court of Appeals' decision upholding this alternative pleading (A5-6) is not challenged in the petition for certiorari.

(9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), involved a conspiracy to prevent McDonald's franchisees from obtaining building permits by the filing of frivolous appeals with the local permit appeals board. The court found that all of the alleged conduct was *prima facie* protected by the First Amendment and stated:

> "What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct that is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Id.*, at 1082-83.

Petitioners also point out that this Ninth Circuit pleading standard has been restated in several other Ninth Circuit cases and cited with approval in other circuits. (P20, n.14) No conflict among the circuits is indicated. Instead, petitioners argue that a conflict among the circuits must be implied from the fact that the *Franchise Realty* standard is not discussed in the decision in this case. Even if that silence created a conflict, however, it would be solely within the Ninth Circuit and therefore more appropriately resolved by that circuit. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

But there is no reason to assume that a conflict exists, since the Court of Appeals explicitly distinguished conduct that is *prima facie* protected (petitioning, organizing a demonstration) from conduct that is not (threats of violence, disruption). (A7, 10-11) The heightened pleading standard does not apply to conduct that is not *prima facie* protected by the First Amendment. The lower court's decision was based on a finding that at least some of petitioners' conduct was not protected by the First Amendment. Conduct that was found to be privileged was specifically excluded as a basis for liability. (A7) Petitioners' argument, therefore, is really that the Court of Appeals' interpretation of facts alleged in the complaint is incorrect. Petitioners do not argue for any change in the existing law on heightened pleading standards; they argue that existing law was not properly applied in this case. Such an error does not warrant correction by this Court. Certiorari should

not be granted merely to affirm settled law. *Estelle v. Gamble*, 429 U.S. 97, 115 (1976).

CONCLUSION

There can be no doubt that McCalden was deprived of his First Amendment rights. Since there is substantial doubt that all of petitioners' conduct is *prima facie* protected by the First Amendment, this action should not be summarily dismissed solely to avoid a possible chilling effect on petitioners' exercise of First Amendment rights.

Respectfully submitted,

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